Office - Supreme Court, U.S.
FILED
OCT 29 1982
CLERK

NO. 82-447

In the Supreme Court of the United States

OCTOBER TERM, 1982

SENTRY INSURANCE A MUTUAL COMPANY
AND GONZALES MANUFACTURING AND
INDUSTRIAL MACHINE WORKS, INC.
Petitioners

VERSUS

TODD SHIPYARDS CORPORATION, ET AL.

ON APPLICATION FOR PETITION
FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO APPLICATION FOR PETITION FOR WRIT OF CERTIORARI

J. Francois Allain
CHAFFE, McCALL, PHILLIPS,
TOLER & SARPY
1500 First N.B.C. Building
New Orleans, La. 70112-1790
(504) 568-1320

and

Donald F. Meeney
Tower Suite
21 West Street
New York, New York 10006
(212) 943-1270
Attorneys for Auto
Transportation, S.A.

A & B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-6585

QUESTIONS PRESENTED

1. SHOULD INDEMNITY BY GONZALES TO TODD BE DENIED UNDER THE FACTS OF THIS CASE?

2. SHOULD FACTS FOUND BY THE DISTRICT COURT, UPHELD BY THE COURT OF APPEALS, BE REVERSED BY THIS HONORABLE COURT SO AS TO EXONERATE THE NEGLIGENT GONZALES WHOSE NEGLIGENCE "WAS LIKE A TIME BOMB AIMED AT THE KATRIN"?

3. DOES THE ADMIRALTY RULE OF PREJUDGMENT INTEREST USURP TRIAL COURT DISCRETION WHERE THE TRIAL COURT DID NOT FIND PECULIAR CIRCUMSTANCES TO DENY PREJUDGMENT INTEREST AND THE RECORD DOES NOT SHOW ANY PECULIAR CIRCUMSTANCES THAT WOULD JUSTIFY DENIAL OF PREJUDGMENT INTEREST?

4. DOES THE "AMERICAN RULE" PROHIBIT AN AWARD OF ATTORNEY FEES IN MARITIME BREACH OF CONTRACT DAMAGE CASES?

STATEMENT OF INTERESTED PARTIES

The parties having an interest in the outcome of this case, pursuant to Rule 21.1(b) of the Rules of the Supreme Court, are listed as follows:

1. Auto Transportation, S.A.

2. Todd Shipyards Corporation

3. Travelers Insurance Company

4. Sentry Insurance, A Mutual Company

5. Turbine Services, Inc.

6. Gonzales Manufacturing and Industrial Machine Works, Inc.

TABLE OF CONTENTS

PAGE

Questions Presented i

Statement of Interested Parties ii

Table of Contents iii

Table of Authorities iv

Jurisdiction 2

Statement of the Case 2

Reasons Why This Writ Should Be Denied 2

QUESTION 1—SHOULD INDEMNITY BY GONZALES TO TODD BE DENIED UNDER THE FACTS OF THIS CASE? 3

QUESTION 2—SHOULD FACTS FOUND BY THE DISTRICT COURT, UPHELD BY THE COURT OF APPEALS, BE REVERSED BY THIS HONORABLE COURT SO AS TO EXONERATE THE NEGLIGENT GONZALES WHOSE NEGLIGENCE "WAS LIKE A TIME BOMB AIMED AT THE KATRIN"? 3

QUESTION 3—DOES THE ADMIRALTY RULE OF PREJUDGMENT INTEREST USURP TRIAL COURT DISCRETION WHERE THE TRIAL COURT DID NOT FIND PECULIAR CIRCUMSTANCES TO DENY PREJUDGMENT INTEREST AND THE RECORD DOES NOT SHOW ANY PECULIAR CIRCUMSTANCES THAT WOULD JUSTIFY DENIAL OF PREJUDGMENT INTEREST? 4

QUESTION 4—DOES THE "AMERICAN RULE" PROHIBIT AN AWARD OF ATTORNEY FEES IN MARITIME BREACH OF CONTRACT DAMAGE CASES? 5

Conclusion 7

TABLE OF AUTHORITIES

CASES: **PAGE**

Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975) 5

Italia Societa v. Oregon Stevedoring Co, 376 U.S. 314, 324 (1964) 3

McCawley v. Ozeanosun Compania Maritime S.A., 505 F.2d 26 (CA 5, 1974) 5

Noritake Co. v. M/V HELLENIC CHAMPION, 627 F.2d 724, 728-30 (5th Cir. 1980) 4

Strachan Shipping Co. v. Koninklyke, Nederlandsche S.M., N.V., 423 F.2d 746 (5th Cir. 1963) 5

Thibodaux v. Texas Eastern Transmission Corp., 548 F.2d 518 (5th Cir. 1977) 5

Vaughan v. Atkinson, 369 U.S. 527, 530 (1962) 5

STATUTES AND CONSTITUTIONAL PROVISIONS:

28 U.S.C. §1254 (1) 2

NO. 82-447

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

SENTRY INSURANCE A MUTUAL COMPANY
AND GONZALES MANUFACTURING AND
INDUSTRIAL MACHINE WORKS, INC.
Petitioners

VERSUS

TODD SHIPYARDS CORPORATION, ET AL.

ON APPLICATION FOR PETITION
FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO APPLICATION FOR PETITION FOR WRIT OF CERTIORARI

Respondent, Auto Transportation S.A., respectfully requests that this Honorable Court deny the petition for writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Fifth Circuit in this case. That opinion is reported at 674 F.2d 401 (5th Cir. 1982), *reh'g denied* 680 F.2d 1389 (5th Cir. 1982). The opinion of the United States District Court for the Eastern District of Louisiana is reported at 467 F. Supp. 1257 (E.D. La. 1978).

JURISDICTION

This Court's jurisdiction is founded on 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

As noted by the Fifth Circuit Court of Appeals, "The trial of this blockbuster maritime action began on November 14, 1977 and ended May 23, 1978. There were 67 days of trial, 28 witnesses, over 7,000 pages of depositions and more than 600 exhibits offered. The record on appeal is contained in 83 volumes."[1]

The statement of facts by the Court of Appeals was correct and is adopted by respondent, Auto Transportation, S.A.

REASONS WHY THIS WRIT SHOULD BE DENIED

It should be noted at the outset that a companion petition for writ of certiorari has been filed in this Court by another insurer of a repairer under number 82-528. Neither petition presents any reason to justify the granting of writs by this Court.

Any analysis of the opinions in this case necessarily begin and end, at some point, with a discussion of the involved facts of this matter. The Court of Appeals used the

[1] 674 F.2d 401, 405 n.1 (5th Cir. 1982).

term "clearly erroneous" in the negative a total of 14 times in its opinion. The facts as found are correct and there is more than ample legal authority to strike each alleged error and for this Court to deny certiorari.

QUESTION 1—SHOULD INDEMNITY BY GONZALES TO TODD BE DENIED UNDER THE FACTS OF THIS CASE?

This issue does not directly involve respondent, except that additional delay is not in the interest of respondent.

The Court of Appeals committed no error in upholding indemnity to Todd from Gonzales based upon the facts of this case. Indemnity in maritime cases is intended to place "the burden ultimately on the company whose default caused the injury." *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 314, 324 (1964). This was accomplished.

QUESTION 2—SHOULD THE FACTS FOUND BY THE DISTRICT COURT, UPHELD BY THE COURT OF APPEALS, BE REVERSED BY THIS HONORABLE COURT SO AS TO EXONERATE THE NEGLIGENT GONZALES WHOSE NEGLIGENCE "WAS LIKE A TIME BOMB AIMED AT THE KATRIN"?

The negligence of Gonzales requires a journey

through the facts of this case. Fortunately, the Court of Appeals has stated these facts in its opinion.[2] The legal duty breached by Gonzales was properly stated:

> " '[A] repairer must have more responsibility than merely following orders...This is particularly true when the customer ordering the work is not a welding expert.' "[3]

QUESTION 3—DOES THE ADMIRALTY RULE OF PREJUDGMENT INTEREST USURP TRIAL COURT DISCRETION WHERE THE TRIAL COURT DID NOT FIND PECULIAR CIRCUMSTANCES TO DENY PREJUDGMENT INTEREST AND THE RECORD DOES NOT SHOW ANY PECULIAR CIRCUMSTANCES THAT WOULD JUSTIFY DENIAL OF PREJUDGMENT INTEREST?

Prejudgment interest in admiralty cases is the rule, not the exception. Before prejudgment interest can be denied the District Court must find "peculiar circumstances" that would make it inequitable to compel the losing party to pay such interest. *Noritake Co. v. M/V HELLENIC CHAMPION*, 627 F.2d 724, 728-30 (5th Cir. 1980). The record not only has facts to show circumstances that would make it inequitable for petitioner to pay prejudgment interest but rather more than amply supports a conclusion that it would be inequitable to deny respondent

[2] 674 F.2d 401, 406, 409 (use of improper welding rod and improper welding technique—a time bomb when placed in context, or rather, reinstalled in the KATRIN).

[3] 674 F.2d 401, 409.

prejudgment interest.

The rule of the Fifth Circuit Court of Appeals in admiralty and maritime cases is not in conflict with any other circuit or with this Court. As noted by this Court in *Vaughan v. Atkinson*, 369 U.S. 527, 530 (1962), "[E]quity is no stranger in admiralty...".

QUESTION 4—DOES THE "AMERICAN RULE" PROHIBIT AN AWARD OF ATTORNEY FEES IN MARITIME BREACH OF CONTRACT DAMAGE CASES?

This Court in *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1975), recognizes that the "American Rule" is riddled with exceptions. A noteable exception is admiralty and maritime cases. 421 U.S. at 248-49. A second noteable exception is found in breach of contract cases in a maritime context. In an appropriate case in which a trial has been needlessly protracted, it is just and proper that such an award be made. *Vaughan v. Atkinson*, 369 U.S. 527 (1962).

Additionally, as found by the lower courts, the foreseeable damages recoverable for breach of repairer's warranties include reasonable attorneys fees. *Thibodaux v. Texas Eastern Transmission Corp.*, 548 F.2d 518 (5th Cir. 1977); *McCawley v. Ozeanosun Compania Maritime S.A.*, 505 F.2d 26 (CA 5, 1974); *Strachan Shipping Co. v. Koninklyke Nederlandsche S.M., N.V.*, 324 F.2d 746 (5th Cir. 1963).

Furthermore, both the District Court and the Court of Appeals noted the circumstances under which Auto Transportation, S.A., was forced to intervene in the litigation when Gonzales and Turbine Services liened the vessel's damaged turbine parts in their claim for monies owed them by Todd after Todd brought suit against them for return of the vessel's damaged turbine parts. 674 F.2d 401, 407. After such intervention, Todd, Gonzales and Turbine Services "united" in defending against Auto's claim for damage, presenting extensive multiple objections to practically every exhibit and much of the testimony offered by Auto. The Court of Appeals in rejecting Todd's claim that it should be entitled to attorney's fees held:

> "Here, Todd's indemnity award was, for the most part, based upon evidence not produced by Todd but by Owner's attorneys' preseverance. Moreover Todd not only defended against liability, but teamed up with Turbine Service and Gonzales to attack almost every item of damage sought to be proven by Owners." 674 F.2d 401, 417.

CONCLUSION

This case was extensively litigated for 6 months in the District Court, was again litigated before the Fifth Circuit Court of Appeals on original hearing and again on applications for rehearing and rehearing *en banc*, and now petitioner requests this Court to relitigate the facts of this case. There is no legal error to be shown by petitioners, only reaction to unpleasant facts. It is therefore submitted that the petition for certiorari be denied.

Respectfully submitted:

CHAFFE, McCALL, PHILLIPS, TOLER & SARPY

By: _____
J. FRANCOIS ALLAIN
1500 First N.B.C. Building
New Orleans, La. 70112-1790
(504) 568-1320

and

Donald F. Mooney
Tower Suite
21 West Street
New York, New York 10006
(212) 943-1270
Attorneys for Auto
Transportation, S.A.